No. 95-719

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE SEVENTH AMENDMENT APPLIES TO FEDERAL COURTS SITTING IN DIVERSITY.

The Second Circuit in this case was extremely clear in articulating the standard it employed to review the district court's denial of the new trial motion. It considered itself "bound to follow the standard set forth" in N.Y. Civ. Prac. L. & R. § 5501(c), which "accords less deference to the jury's award" than does the federal standard. Pet. App. 8a. In doing so the appellate court was following its decision in *Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1013 (2d Cir. 1995) (amended), which held that § 5501(c) "[u]nquestionably . . . provides the standard for appellate review" in diversity cases arising under New York law. Moreover, the *Consorti* court made clear that application of the New York standard of review, upon which it relied in "determining excessiveness and the appropriateness of remittitur," 72 F.3d at 1012, would require the appellate court to stand in the role of jurors and determine for itself what would be "reasonable" compensation:

> This standard requires the *reviewing court* to determine the range *it* regards as reasonable, and to determine whether the particular jury award deviates materially from that range, taking corrective action if it does.

Id. at 1012 (emphasis supplied). Not only did the Second Circuit in this case never suggest that it was applying a federal standard of review, the court in *Consorti* pointed out that its decision *conflicted* with those Circuits that *did* apply a federal standard of review. *See id.* at 1013 n.9 (noting conflict with, *inter alia*, *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991), which held that a federal court reviewing punitive damages must apply an "abuse of discretion standard" (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259 (1989))).

Rather than defending the Second Circuit's unambiguous refusal to employ a federal standard of review, respondent makes the ludicrous claim that, while the appellate court "did not expressly use the phrase 'abuse of discretion,'" what it really meant to do was apply federal abuse of discretion review. Resp. Br. at 50. One can only conclude that respondent, like petitioner, finds the Second Circuit's failure to apply a federal standard of review indefensible.

Having declined to defend the Second Circuit's refusal to use a federal standard of appellate review in this case, respondent instead chooses to do battle with the straw person of "federal common law." Resp. Br. at 44. Federal common law has nothing to do with this case. The factors the jury was instructed to consider in determining damages, App. 304-306 (and which were largely ignored by the appellate court, Pet. Br. at 8), are determined by New York law. Moreover, the state as a matter of its substantive law may, among other things, eliminate the availability of damages for a particular claim entirely, limit the factors a jury may consider in determining damages, or place an absolute cap on the amount of damages available, and such substantive law would be applicable in a federal court sitting in diversity.[1] Because state substantive limits on damages that do not alter the division of fact finding responsibility among the jury, trial court and appellate court are fully applicable in diversity, respondent's and its *amici's* parade of horribles concerning forum-shopping are exaggerated.

A state may also, as part of a "multi-year effort . . . for tort reform," Brief *Amicus Curiae* of the City of New York at 6, or otherwise, assign to its state appellate courts the task of re-examining the evidence presented to the jury on damages, and of reaching its own conclusion on what amount of damages would be "reasonable." A state may do this because the Seventh Amendment does not apply to state courts. A federal appellate court may not adopt this state court rule because the Seventh Amendment prevents

[1] An example of a state's elimination of recovery for a particular claim is provided by New York's law on negligent infliction of emotional distress, which disallows recovery by a bystander unless the bystander was a member of victim's immediate family. *See, e.g., Trombetta v. Conkling*, 82 N.Y.2d 549, 605 N.Y.S.2d 678 (1993). An example of a state's limitation of factors a jury may consider in determining damages is provided by New York's law on wrongful death, which provides that a jury determining damages to be awarded a family member in a wrongful death action may consider only the family member's pecuniary losses. *See* N.Y. Est. Powers & Trusts § 5-4.3 (Consol. 1995). An example of an absolute cap on damages is proved by 1995 New York Assembly Bill 6564, which would limit awards for non-economic loss in claims against public entities to $250,000. *See also Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (applying Virgin Island's statutory cap on malpractice damage recovery in diversity case); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (same).

it from reexamining facts found by a jury except "according to the rules of the common law." U.S. Const. amend. VII. *See also* Pet. Br. at 15 n.11; *Reid v. Nelson*, 154 F.2d 724, 726 (5th Cir. 1946).

This Court recognized this distinction in *Browning-Ferris*. The *Browning-Ferris* petitioners and their *amici* asked the Court to craft a federal common-law standard of "excessiveness" that would have defined the factors to be considered in determining punitive damages, such as "proportionality between punitive and compensatory damages," or "statutory penalties for similar conduct." 492 U.S. at 279. The Court declined, *id.*, having observed that the factors a jury may consider in determining the amount of damages is a matter of state law. *Id.* at 278.

This Court made *very* clear, however, that once a jury and a district court have evaluated the evidence of damages according to the factors provided by state law,[2] "the strictures of the Seventh Amendment," *id.* at 280 n.26, do not allow a federal appellate court "to review directly the award for excessiveness, or to substitute our judgment for that of the jury," *id.* at 278. Because the Second Circuit in this case did exactly that, *see infra* Point III, its decision must be reversed.

II. THE SEVENTH AMENDMENT'S REEXAMINATION CLAUSE PROHIBITS APPELLATE REVIEW OF JURY FACT FINDINGS.

Respondent's central contention is that there is *no distinction* between a trial court and an appellate court's power to reexamine jury fact findings under the Seventh Amendment. Resp. Br. at 17-18. On its face, this proposition is absurd. Respondent cannot cite a *single case* in which an appellate court asserts the same power as the trial judge to review a jury's fact findings. Careful analysis

[2] This Court in *Browning-Ferris* mentioned application of a "state-law standard in considering whether the verdict returned was excessive," 492 U.S. at 280, *only* when discussing the responsibilities of the jury and the district court. Thus, this Court held, the Court of Appeals' "conclusion that there was no abuse of discretion by the District Court is consistent with federal standards, in light of the broad range of factors Vermont law permits *juries* to consider in awarding punitive damages." *Id.* (emphasis supplied).

bears out this first impression. The language and history of the Reexamination Clause, American federal jurisprudence, and English common law demonstrate that while a trial judge may reexamine facts tried by a jury, an appellate court may not.[3]

Language and History of the Reexamination Clause. The Reexamination Clause states "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Respondent's only textual argument is that because the Reexamination Clause does not have separate provisions for trial and appellate court reexamination of jury fact findings, there is no basis to distinguish between them. Resp. Br. at 12, 17-18. But the Reexamination Clause prohibits judicial reexamination of jury fact findings except "according to the rules of the common law." Because the "rules of the common law" distinguish between trial court and appellate court review of jury fact findings, *see infra* at 10, this distinction is expressed in the Amendment's plain language.

As for legislative history, respondent simply ignores the historical record set out in petitioner's brief. *See* Pet. Br. at 22-26 & nn.19-25. Respondent does not deny the Constitution's provision for appellate review of facts was a prime motive behind the drive for the Seventh Amendment's guarantee. Resp. Br. at 13. Nor does respondent contradict that the ratifiers believed appellate review of jury fact findings was "utterly inconsistent with the principles of the

[3] Incredibly, respondent also argues that the Seventh Amendment is not implicated when an appellate court grants a new trial motion because the plaintiff gets a new jury trial. Resp. Br. at 17, 32 (relying solely on William Blume, *Review of Facts in Jury Cases – The Seventh Amendment*, 20 J. Am. Jud. Soc. 130, 131 (1936)). This novel claim is belied by the text of the Seventh Amendment, the English common law practice, and over 200 years of American jurisprudence, *see, e.g., Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899) ("facts once tried by a jury cannot be tried anew, *by a jury or otherwise*, in any court of the United States" (emphasis supplied)). Simply put, no court or commentator has ever understood the Seventh Amendment's Reexamination Clause to permit review of a jury's fact-finding provided a new trial was ordered. The Seventh Amendment right to trial by jury free from appellate court interference is not the right to have as many jury trials as it takes to find a jury that will return a verdict in keeping with an appellate court's opinion of the facts.

common law, and trials by jury." 3 *The Complete Anti-Federalist* 159 (Herbert J. Storing ed., 1981). Finally, respondent offers nothing to refute the conclusion that the Reexamination Clause was designed specifically to prevent appellate review of jury fact findings. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377 (1913); *Chicago B. & Q. R. v. Chicago*, 166 U.S. 226, 243 (1897).

Instead, respondent's analysis ignores the Reexamination Clause and denies the relevance of its legislative history. First, respondent repeatedly makes the strange argument that the Reexamination Clause only preserves the "essentials" or "substance of the jury trial right, not a particular form of jury trial or review thereof." Resp. Br. at 15, 16; *see also id.* at 11-12, 13-14. But the only authorities respondent cites to support this claim have nothing to do with the Reexamination Clause; rather they all involve the Seventh Amendment's *first clause*, which indeed merely preserves "the right of trial by jury" generally. U.S. Const. amend. VII, cl. 1.

Yet, the Seventh Amendment does more than preserve the "general right to a jury trial." Resp. Br. at 11. It is true, there is no clause in the Seventh Amendment that states "jurors shall not be allowed meat, drink, fire, or candle otherwise than according to the rules of the common law." *See* Resp. Br. at 27 n.15. But the Reexamination Clause *does* impose the "rules of the common law" as a constitutional mandate regarding judicial reexamination of jury fact findings.

Similar problems beset respondent's related argument that the "rules of the common law" referenced in the Reexamination Clause were "constantly changing," "widely divergent," and "undefined." Resp. Br. at 14 (citations omitted).[4] Again, respondent's author-

[4] Respondent's argument includes the implicit assertion that the "rules of the common law" referred to in the Seventh Amendment are not those of *English* common law, but rather the common law practice in the original thirteen states. *See, e.g.*, Resp. Br. at 14 (arguing that "great differences . . . existed among the states in according a jury trial"). This point flies in the face of this Court's repeated holding that the provision's reference to common law "had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the states." *Capital Traction Co. v. Hof*, 174 U.S.

(continued...)

ities all concern other aspects of jury trials; none refers to any divergence or change or ambiguity regarding whether an appellate court could reexamine facts tried by a jury.[5] Respondent cites nothing from the ratification debates that shows the framers believed there was any variance or uncertainty in the common law on *this point*.[6]

Finally, respondent claims that although the ratifiers who pressed for the passage of the Seventh Amendment's Reexamination Clause were specifically motivated to preclude appellate review of jury fact findings, *see* Pet. Br. at 23-25 & nn.21-24, they supposedly "'won' the argument over whether the Constitution needed an explicit jury trial guarantee," Resp. Br. at 13, but "lost" the "second argument"

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[4] (...continued)
1 at 8. *Cf. Wooddell v. Int'l Brotherhood of Electrical Workers*, 502 U.S. 93, 97 (1991). This conclusion is amply supported by the historical record. For example, the guarantee of the right to jury trials found in the 1774 declaration of rights of the first Continental Congress specifically referred to "the common law of England," 1 Journals of Congress 28 (1774), as did several of the state constitutions. *See, e.g.*, N.J. Const., art. XXII (1776); Md. Const., Declaration of Rights, art. III (1776); *see also* N.Y. Const., art. XLI (1777). Likewise, the state ratifying conventions' proposals to guarantee the right to trial by jury frequently referred to the common law of England. *See, e.g.*, 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 1891) 328 (New York) (hereinafter "*Elliot, Debates*"); *id.* at 334-35 (Rhode Island); 2 *Elliot, Debates* 550-51 (Maryland). Thus, respondent's repeated reference to alleged "differences" among state jury trial practices is simply irrelevant. *See also* 3 *The Complete Anti-Federalist*, *supra*, at 59-60; 2 *The Complete Anti-Federalist*, *supra*, at 321.

[5] *Galloway v. United States*, 319 U.S. 372, 390-92 & nn.23-25 (1943) (no mention of appellate review of jury fact findings); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 299-317 (1966) (no claim that different practices existed regarding whether an appellate court could reexamine facts found by a jury).

[6] The ratifiers who fought for the Reexamination Clause were united in their view that at common law appellate review of jury fact findings was prohibited. *See* Pet. Br. at 23-25 & nn.21-24. Even federalists who opposed the Seventh Amendment denied the power of an appellate court to review jury fact findings at common law. *See, e.g., The Federalist* No. 81, at 551 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *cf.* 2 *Elliot, Debates* 493.

over "how such a guarantee should be crafted." *Id.* at 12, 14-15. But there was no "second argument" over the drafting of the Reexamination Clause. The antifederalists insisted on the provision as a "price of approval of the Constitution." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 725 (1973). For the antifederalists, it was sufficient to prevent appellate review of jury fact findings by referring to English common law, which they understood to provide "no appeal from the verdict of a jury, as to facts . . . ." 2 *The Complete Anti-Federalist*, *supra* at 322. The federalists simply opposed the constitutional guarantee entirely; they made no competing proposal for its language.

Respondent makes the related claim that because the Seventh Amendment was drafted by "arch-Federalist" Madison, it must not have been intended as a "self-defining text," but instead was essentially meaningless, "tethered to the undefined body of . . . 'rules of the common law.'" Resp. Br. at 14. But Madison himself said the Bill of Rights, including the Seventh Amendment, were "those most strenuously required by the *opponents* to the constitution," 1 Annals of Cong. 775 (Joseph Gales ed., 1789) (emphasis supplied), and he specifically proposed the Reexamination Clause to modify the Constitution's provision for "appellate Jurisdiction, both as to Law and Fact." *See* 1 Annals of Cong. 452, 784 (Joseph Gales ed., 1789). In essence, respondent's position requires us to believe that Madison was engaged in an elaborate ruse, pretending to meet the demands of the antifederalists, while actually drafting an empty provision that placed no restriction on appellate review of jury fact findings. Needless to say, there is little to recommend this method for interpreting our Constitution.

American Jurisprudence. Respondent ignores the prohibition on appellate review of fact findings in jury cases found in the Judiciary Act of 1789, § 22, 1 Stat. 84-85. Instead, respondent cites Section 17 of the Act, 1 Stat. 83, which states that "all the said courts of the United States shall have power to grant new trials," to argue that federal appellate courts always have possessed the same power as trial courts to review jury fact findings. *See* Resp. Br. at 9, 19. What respondent neglects to mention is that all

three federal courts created by the Judiciary Act -- the district courts, the circuit courts, and this Court -- had original jurisdiction as *trial courts*. Judiciary Act of 1789, §§ 9, 11, 13, 1 Stat. 76-77, 78, 80-81. The circuit courts and the Supreme Court also separately had appellate jurisdiction. *Id.*, §§ 11, 13, 1 Stat. 79, 81. But only in their capacity as *trial courts* could the circuit courts and this Court grant new trials.

This explains why respondent can provide an "appendix" of 73 *trial court* decisions from the circuit courts involving review of jury verdicts for excessiveness, but cannot cite a single *appeal* in either the circuit courts or this Court where the appellate court exercised such review. *See* Resp. Br. at 34 and Appendix A.[7] In fact, the "invariable practice in every . . . circuit" was that the appellate courts were prohibited from reexamining a jury's fact findings or granting a new trial. *United States v. Wonson*, 28 F. Cas. 745, 749 (C.C.D. Mass. 1812) (No. 16,750); *see also Maddox v. Stewart*, 16 F. Cas. 361 (C.C.D.C. 1824) (No. 8,934); *Davidson v. Burr*, 7 F. Cas. 30 (C.C.D.C. 1824) (No. 3,602).[8]

As for this Court's jurisprudence, the best respondent can manage

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[7] Understandably displeased with its failure to find a single federal appellate decision prior to this century that reverses a jury verdict as being excessive, respondent changes the subject, repeatedly pointing out that federal appellate courts may grant remittitur. *See* Resp. Br. at 17-18, 35-36. It is true that federal appellate courts may grant remittitur; it is also irrelevant. The pre-20th century cases involving appellate remittitur cited by respondent involved only *legal challenges* to damage awards. *See, e.g., Hansen v. Boyd*, 161 U.S. 397, 411 (1896); *Bank of Kentucky v. Ashley*, 27 U.S. (2 Pet.) 327, 329 (1829), *cited in* Resp. Br. at 36 n.25. But appellate remittitur implicates the Reexamination Clause *only* where it is the result of a reexamination of jury fact findings.

[8] Respondent cites only two federal appellate court decisions from prior to the 20th century that mention the size of a jury verdict. *See* Resp. Br. at 34-35 nn. 22-23. Both cases were decided near the end of the 19th century, and in each case the appellate court, after considering various legal issues raised on appeal, casually stated at the end of its opinion that damages were *not* so excessive as to indicate "passion or prejudice" by the jury, thus *rejecting* any invitation to reexamine the jury's fact findings. *New Orleans & C. R. v. Schneider*, 60 F. 210, 212 (5th Cir. 1893); *Southern Pac. Co. v. Rauh*, 49 F. 696, 707 (9th Cir. 1892). On this slender reed rests respondent's claim that appellate review of jury verdicts for excessiveness is "thoroughly engrained" in our federal system. Resp. Br. at 38.

is the feeble claim that this Court "has 'never . . . expressly' held that the Seventh Amendment precludes or permits appellate review of a denial of a motion to set aside a verdict as excessive." Resp. Br. at 38. Even this modest assertion is false. Since *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447-48 (1830), this Court has repeatedly held that the Seventh Amendment precludes appellate review of jury fact findings, including damage awards. Pet. Br. at 35-37 & nn.35-36; Brief of Federal Jurisdiction and Legal History Scholars Akhil Reed Amar, *et al.*, as *Amici Curiae* ("Amar Br.") at 6-11; *see also* Products Liability Advisory Council as *Amicus Curiae* ("PLAC Br.") at 13-14 (urging that *Parsons* and its progeny be overruled). Respondent does its best to distinguish these cases, but even accepting respondent's narrowing of the issue presented, it remains true that this Court has repeatedly, unambiguously held that the Seventh Amendment precludes federal appellate court review of a jury verdict for excessiveness. For example, in *New York Central & Hudson River R.R. v. Fraloff*, 100 U.S. 24 (1879), in refusing to review the denial of a new trial motion this Court said:

> No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a *less amount*. . . . [O]ur power is *restricted by the Constitution* to the determination of questions of law arising upon the record. Our authority does not extend *to a re-examination of facts which have been tried by the jury* under instructions correctly defining the legal rights of the parties.

Id. at 31 (emphasis supplied, citations omitted).[9]

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[9] *See also Lincoln v. Power*, 151 U.S 436, 437-39 (1894) (citing Reexamination Clause to hold that Court was "not permitted" on appeal to take notice of a challenge to a jury's award of damages as excessive); *Chicago, B. & Q. R. v. Chicago*, 166 U.S. 226, 242-46 (1897) (after detailed analysis of Reexamination Clause, holding that "the last clause of the seventh amendment forbids the retrial by this court of the facts tried by the jury" related to claim that damages awarded

(continued...)

Respondent tries but fails to find some support for its view that the Seventh Amendment permits appellate review of a jury's verdict as being excessive. *See* Resp. Br. at 37-38. *Hansen v. Boyd*, 161 U.S. 397, 409, 411 (1896), for example, did not involve excessiveness review at all, but instead concerned remittitur following an erroneous jury instruction, *i.e.*, a legal error. *See supra* at 8 n. 7. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482-83 (1933) merely held that an appellate court may review a trial judge's denial of a new trial motion when the denial is premised on a *legal error*. And the Reexamination Clause did not apply in *Kennon v. Gilmer*, 131 U.S. 22 (1889), which involved the territorial Montana Supreme Court, *not* a "Court of the United States." *See* U.S. Const. amend VII, cl. 2.[10]

English Common Law. Respondent does not dispute that at common law all appellate review was by "writ of error," under which only questions of law, not a jury's fact finding, could be reviewed. 3 William Blackstone, *Commentaries on the Laws of England* 405-06 (1st ed. 1768) (hereinafter "Blackstone, *Commentaries*") (under writ of error, "there is no method of reversing an error in the determination of facts"). Nor can respondent cite a single English common law decision from the period of the Seventh Amendment's adoption that asserts the power of an appellate tribunal to review a jury's fact findings, or to review the denial of a

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[9] (...continued)
were inadequate).

[10] The statement in *Kennon*, 131 U.S. at 28, that the Seventh Amendment "is in full force in Montana," only refers to the Amendment's *first clause*, the general guarantee of the jury trial right, made applicable to the territories by statute. *Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1850) (applying Seventh Amendment's *first clause* to territory), *cited in Kennon*, 131 U.S. at 28. *Cf. Walker v. New Mexico & S.P.R.*, 165 U.S. 593, 595-96 (1897) (while "all the provisions of the seventh amendment" may not apply to the territories, by statute the general right of jury trial applies).

motion for a new trial. *See* Pet. Br. at 26-28.[11]

Instead, respondent and its *amici* fall back on the *nisi prius* system of holding jury trials in the local county before a single judge, in lieu of a trial at Westminster before the trial court's *en banc* panel. Many jury trials were still conducted "at the bar" before the entire trial court *en banc* at Westminster, in which case the trial court *en banc* would decide any new trial motion.[12] But because where the *nisi prius* system was used the motion for a new trial still would be heard by the trial court sitting *en banc* at Westminster, and not by the *nisi prius* judge sitting alone in the county, respondent argues the *en banc* trial court at Westminster was really an "analogue" or "functional equivalent" of American federal appellate courts. Resp. Br. at 25, 30.

But the English common law trial courts were not merely "analogues" to trial courts; they *were* trial courts. They had original jurisdiction. They could conduct trials, receive evidence, hear testimony and resolve disputed factual issues. Respondent suggests the only reason to think the English common law trial courts were, in fact, acting as trial courts, is that "the *en banc* court ruled on the motion for new trial before entry of final judgment."

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[11] All the English cases cited by respondent and its *amici* are *trial court* decisions. *See* Resp. Br. at 21-22; PLAC Br. at 10 & n.6. Respondent and its *amici* make the confused point that the English common law trial courts also could exercise appellate jurisdiction in some cases, apparently hoping to suggest that English common law courts would, on appeal, reexamine jury fact findings or consider motions for new trials. *See* Resp. Br. at 9; PLAC Br. at 15. But the English common law courts only reexamined jury fact findings, or considered new trial motions, when acting within their trial jurisdiction. There is a complete "absence of cases in which new trials were granted by the Court of King's Bench when it sat as a court of appeals from Common Pleas." Jerry LeMond, *Federal Review of Excessive Verdicts*, 30 Tex. L. Rev. 242, 244 & n.19 (1951).

[12] Respondent makes the misleading suggestion that when trials were held "at the bar" at Westminster before the entire *en banc* court, motions for new trial were made to a different panel of judges. Resp. Br. at 23. This is absolutely false; the same four judges who presided at the trial decided the motion for a new trial. *See Bright v. Eynon*, 1 Burr. 390, 395, 97 Eng. Rep. 365, 367 (K.B. 1757) (after trial at bar, motion for new trial "is grounded upon what must have manifestly and fully appeared to the whole Court").

Resp. Br. at 25. Actually, not only the entry of judgment, but *every* aspect of the case -- except the jury proceedings -- was conducted before the trial court sitting *en banc* at Westminster. *See* Pet. Br. at 29-30. And if the *en banc* court elected to grant a new trial, it could conduct the re-trial itself. *Leighton v. Leighton*, 1 P. Wms. 671, 24 Eng. Rep. 563 (Ex. 1720).[13]

This Court has already resolved this issue against respondent in the context of the Reexamination Clause. In *Metropolitan R.R. v. Moore*, 121 U.S. 558, 573 (1887), the Court held: "The appeal from the special to the general term is not an appeal from one court to another, but is simply a step in the progress of the cause during its pendency in the same court. The supreme court sitting at special term, and the supreme court sitting in the general term, though the judges may differ, is the same tribunal."[14]

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[13] If there is any modern "analogue" to this system, it occurs where an action is commenced, and the trial court refers a particular matter for resolution to another adjudicator. For example, 28 U.S.C. § 636(b)(1)(B) allows a district judge to designate a magistrate to conduct evidentiary hearings and to submit proposed findings of fact. But the magistrate is not empowered to enter judgment or finally resolve the case. Instead, any "such proposed findings and recommendations" may be objected to, in which case the district judge "shall make a de novo determination . . . " *Id.*, § 636(b)(1). Respondent cites 28 U.S.C. § 636(c) for the proposition that a district court "engages in 'appellate' review" when it reviews the decision of a magistrate. Resp. Br. at 26 n. 14. But the referenced subsection applies where the *entire case* has been referred to the magistrate, including *"the entry of judgment in the case."* 28 U.S.C. § 636(c)(1) (emphasis supplied). This is precisely the power the *nisi prius* judge lacked. Apparently, entry of judgment has "talismanic significance" after all. Resp. Br. at 25.

[14] In the absence of any statement by any English common law court to the effect that the *en banc* court was acting in an appellate capacity when it considered a motion for a new trial after trial at *nisi prius*, respondent is forced to rely on a sentence fragment where Blackstone appears to refer to the *en banc* court as the "court above." Blackstone, *Commentaries*, at 387. But Blackstone demonstrates that he understood the motion for a new trial as being made to a trial, not appellate court. Thus, Chapter 24 of the *Commentaries*, entitled "Of Judgment, and it's Incidents," considers "the transactions in a cause, next immediately subsequent to arguing the demurrer, or trial of the issue," *id.* at 386, including the motion for a new trial. By contrast, Chapter 25, entitled "Of Proceedings, in the nature of Appeals," considers the writ of error. *Id.* at 402, 405.

(continued...)

Respondent's argument, then, is a bit like saying apples are "analogues" to oranges. But respondent has another problem: the English common law trial courts would grant a new trial on the ground that the verdict was excessive or against the weight of the evidence *only* if "the judge who had tried the case 'conceived the verdict to be given against the evidence.'" John M. Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am. J. Leg. Hist. 201, 213 (1988). *See also* Pet. Br. at 31-34 & nn.30-33 (citing cases). Respondent all but concedes this point as to new trial motions based on liability, but insists "[t]here was no such requirement for new trials based on excessive damages." Resp. Br. at 27. Incredibly, respondent hangs

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[14] (...continued)

Respondent's *amicus* PLAC commits a related, albeit more egregious misreading of Blackstone. Quoting the "scholarly" opinion by Judge Edwin Holmes in *Sunray Oil Corp. v. Allbritton*, 187 F.2d 475, 477-84 (5th Cir.) (Holmes, J., dissenting), *cert. denied*, 342 U.S. 828 (1931), respondent's amicus says "Judge Holmes cites both Blackstone and Bracton for the proposition that":

> "[n]ot only did the court of original jurisdiction have power to order a conditional remittitur, and were under a duty to amend an excessive verdict, but if they failed to do this 'or could not decide it,' as Bracton said, 'it was **referred to a higher tribunal**.'" 187 F.2d at 479.

PLAC Br. at 10 (emphasis supplied). But in the referenced passage Blackstone was not discussing the motion for a new trial; rather, he was providing historical background to the writ of attaint, the punishment for "false verdict" used hundreds of years before the new trial motion was developed at common law. (As respondent acknowledges, the writ of attaint "fell into disuse" by the sixteenth century. Resp. Br. at 22 n.13.) In this context, Blackstone quotes Bracton, a *thirteenth century* legal commentator, who died hundreds of years before the motion for new trial was developed at common law. 3 William Blackstone, *Commentaries on the Laws of England* 1348-49 n.s (William D. Lewis ed., 1893). Even in this irrelevant context, respondent's *amicus* misconstrues the quote from Bracton. In fact, **the reference to a "higher tribunal" is a reference to God**. Thus, the quoted passage from Bracton immediately continues: "There is an oath tendered by one party to the other in court, or by the judge to a party, upon which no conviction follows, for it is sufficient that they await the vengeance of God." 3 *Bracton de Legibus et Consuetudinibus Angliae (Bracton on the Laws and Customs of England)* 342 (George E. Woodbine ed. & Samuel E. Thorne trans., 1977).

this purported liability/damages distinction on a *semi-colon* in Blackstone. *See* Resp. Br. at 27-28. Doubtless respondent is forced to such extremes because it cannot cite a single case (or scholarly authority) to support its argument.

For *both* liability *and* damages English common law courts repeatedly and explicitly stated that a new trial motion would be granted on the ground that the verdict was against the weight of the evidence only where the *nisi prius* judge so certified. Thus, in *Redshaw v. Brook*, 2 Wils. K.B. 405, 95 Eng. Rep. 887 (C.P. 1769), a new trial motion was made on the ground that damages were excessive, but Lord Chief Justice Wilmot, before whom the case was tried, said he was "not dissatisfied with the verdict." *Id.*, 95 Eng. Rep. at 888. Justice Clive, speaking for the court, said: "As my Lord Chief Justice is not dissatisfied, how can we say that these damages are too large? A rule to shew cause why there should not be a new trial was refused per totam Curiam . . . ." *Id.* *See also* Amar Br. at 14-15.[15]

Respondent cites a few cases for the proposition that the "common-law decisions are consistent with" its liability/damages distinction, Resp. Br. at 29 n.17, but these cases do not state one way or the other whether the trial court relied on the *nisi prius* judge's certification. Respondent's reliance on this silence is misplaced. For example, three of the cases do not state that trial was held before a *nisi prius* judge, which would explain why they do not mention a *nisi prius* judge's certification.[16] In contrast,

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[15] *See also Boulsworth v. Pilkington*, Jones, T. 200, 84 Eng. Rep. 1216 (K.B. 1685); *Gilbert v. Burtenshaw*, 1 Cowp. 230, 98 Eng. Rep. 1059 (K.B. 1774); *Benson v. Frederick*, 3 Burr. 1845, 97 Eng. Rep. 1130 (K.B. 1766); *Huckle v. Money*, 2 Wils. K.B. 205, 207, 95 Eng. Rep. 768, 769 (C.P. 1763); *Ducker v. Wood*, 1 T.R. 277, 99 Eng. Rep. 1092 (K.B. 1786).

[16] *See Goldsmith v. Lord Sefton*, 3 Anst. 808, 145 Eng. Rep. 1046 (Ex. 1796); *Seale v. Hunter*, Lofft, 28, 98 Eng. Rep. 515 (K.B. 1771); *Ash v. Ash*, Comb., 357, 90 Eng. Rep. 526 (K.B. 1701). *Clerk v. Udall*, 2 Salk. 649, 91 Eng. Rep. 552 (K.B. 1702), in describing the background of the case, states that in a prior decision a new trial was granted for excessive damages. There is no report of the prior decision, however, and no basis for concluding that it was made in the absence of the *nisi prius* judge's certification. *Chambers v. Robinson*, 2 Str. 691, (continued...)

there are several reported decisions explicitly stating "[t]he Court will not award new tryals on the jurors gainsaying their verdicts, unless the Judge before whom it was, conceived the verdict to be given against the evidence per Curiam." *Anon.*, 1 Keb. 4, 83 Eng. Rep. 775 (K.B. 1661).[17]

The simple truth is common law had a recognized method of appeal, the writ of error, which absolutely forbade appellate reexamination of jury fact findings. Pet. Br. at 26-28. Respondent insists common law appellate courts did not review jury fact findings only because it was not technologically feasible to bring the evidentiary record up for appellate review. Resp. Br. at 9-10, 29, 30n.20, 31-32. But English and American courts *could* record testimony and preserve an evidentiary record for appellate review of the facts, 3 Blackstone, *Commentaries* at 374, 390, and they did so in suits outside the common law, where no right to jury trial obtained. *See* Judiciary Act of 1789, §§ 19, 30, 1 Stat. 83, 89-90.

But while this procedure was available, federal courts, constrained by the Seventh Amendment, would not apply it to actions at common law, because "to devolve on this court such a re-examination of facts, without a trial by jury . . . would be to give it to an *unconstitutional operation*, dangerous to the trial by jury, and at times subversive of the public liberties." *Phillips v. Preston*, 46 U.S. (5 How.) 278, 289 (1847) (emphasis supplied).

III. THE SECOND CIRCUIT ENGAGED IN AN IMPERMISSIBLE REEXAMINATION OF THE JURY'S FACT FINDINGS ON DAMAGES.

Respondent attempts to avoid application of the Reexamination

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[16] (...continued)
93 Eng. Rep. 787 (K.B. 1726), happens to be the only case in this area expressly disapproved by later decisions. *See Beardmore v. Carrington*, 2 Wils. K.B. 244, 249, 95 Eng. Rep. 790, 793 (K.B. 1764) ("this case is not law").

[17] Respondent adds the disingenuous argument that there are "many cases in which the *en banc* court refused to follow the trial judge's [sic] recommendation on excessive damages." Resp. Br. at 29-30. As respondent well knows, in the cases referred to the *nisi prius* judge certified that the verdict was excessive, yet the trial court *en banc* nonetheless *denied* the new trial motion. Pet. Br. at 34 n. 33.

Clause by characterizing the review conducted by the Second Circuit as one of law rather than fact.[18] It cannot be done.

This Court has repeatedly held that assessment of damages is decidedly factual, making it peculiarly within the province of the jury. *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915) (excessive damages "involves only a question of fact, and is not open to reconsideration here"); *Metropolitan R.R. v. Moore*, 121 U.S. 558, 574 (1887) ("motions for new trial based on . . . excessive[ness]" present "purely a question of fact, not determinable by any fixed and certain rule of law"). *See also Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("question of liability and . . . damages. . . . are questions of fact" for jury). *See also* Amar Br. at 19.[19]

Even Blume, on whom respondent heavily relies, *see* Resp. Br.

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[18] Respondent's attempt to transform issues of "fact" into "law" is "drastic in that it amounts to a direct assault on the prerogatives of fact finders." Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question and Procedural Discretion*, 64 N.C. L. Rev. 993, 1018 (1986). "The classification of ultimate facts as questions of law amounts to a manipulation of the law-fact doctrine to take questions from the jury or to subject the trial level's resolution of questions to free appellate review." *Id.* at 1028. *See* Amar Br. at 18-19; *see also id.* at 20-21 (explaining why respondent's claim that substantive due process concerns require appellate review for excessiveness is unavailing).

[19] Respondent's argument that assessment of damages is not a jury question at all, Resp. Br. at 17 n.10, would indeed be news to Blackstone, who considered damage assessment as a question solely for the jury even in cases where liability was not disputed. In discussing interlocutory judgments, Blackstone wrote: "But the interlocutory judgments, most usually spoken of, are those incomplete judgments, whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury." Blackstone, *Commentaries*, *supra* at 397 (emphasis in original). The factual assessment of damages is at the very heart of the Seventh Amendment. *Barry v. Edmunds*, 116 U.S. 550, 564-65 (1886) ("nothing is better settled than that in such cases . . . where no precise rule of law fixes the recoverable damages it is the peculiar function of the jury to determine the amount by their verdict"); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2348 (1994) (Ginsberg, J., dissenting) ("[i]n the early years of our Nation, . . . trial by jury was recognized as the constitutional right of parties" pursuant to the Seventh Amendment and "the assessment of 'uncertain damages' was regarded, generally, as exclusively a jury function" (citation omitted)).

at 17, 20, 23, 32, explained that "[i]t cannot be said that the question presented is a question of law. In deciding whether a jury found against the weight of the evidence, the trial judge must weigh the evidence and decide the facts. In reviewing his decision the appellate court is reviewing the case on the facts." Blume, 20 J. Am. Jud. Soc. at 131. *See also* Charles A. Wright, Arthur L. Miller & Mary K. Kane, *Federal Practice & Procedure* § 2819 at 202 (2d ed. 1995) (argument that appeals court is reviewing a question of law is "so purely verbal, and its implications for the Seventh Amendment so plainly devastating, that it has been rejected even by those who support appellate review" (citing *id.*)).

Respondent's argument blurs the critical distinction between judicial review of sufficiency of the evidence under Fed. R. Civ. P. 50 (judgment as a matter of law)[20] and motion for a new trial under Fed. R. Civ. P. 59 (in this case, weight of the evidence and excessiveness review). The first requires a legal determination of whether the evidence was sufficient to necessitate invoking the jury's jurisdiction over factual matters in the first instance. It requires a reviewing court to test the evidence against a legal standard of sufficiency to determine whether the case is proper for jury consideration. The second necessitates a factual determination of whether the court, having witnessed the presentation of the evidence, concurs with the jury's verdict. It requires the court to weigh the evidence presented to determine whether the facts found by the jury are correct. *See* Wright, Miller & Kane § 2531 at 302 ("The contrasts between the two motions are dramatic"; they "have wholly distinct functions and entirely different standards govern their allowance. . . . On a motion for a new trial the court may consider the credibility of witnesses and the weight of the evidence. On a motion for judgment as a matter of law, it may not."). Thus, a federal appellate court may review the disposition of a motion for judgment as a matter of law, but may not review a motion for a

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[20] The pre-1991 reference to judgment notwithstanding the verdict was changed to judgment as a matter of law, at least in part, because of the confusion it engendered by implying an impermissible judicial reassessment of jury-found facts. Notes of Advisory Committee on Rules to 1991 Amendment (the term judgment notwithstanding the verdict was removed because it was "a misleading description of the relationship between judge and jury. . . . freighted with anachronisms").

new trial challenging the verdict as against the weight of the evidence and excessive, because it would require the appellate court to reconsider and re-weigh the jury's findings of fact on damages.

Because sufficiency of the evidence review and weight of the evidence review are critically different, respondent's reliance on *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321-22 (1967), Resp. Br. at 18-21, is misplaced.[21] Respondent contends that, by reaffirming the long-settled proposition that district court determinations of motions for judgment as a matter of law are reviewable on appeal, this Court in *Neely* somehow conceded that the Seventh Amendment permits appellate weight of the evidence and excessiveness review. This argumen. is illogical on its face.[22]

Respondent's assertions notwithstanding, the court of appeals in this case did not, and could not,[23] review the legal question of

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[21] By claiming that "this Court flatly rejected the argument that district courts have greater powers to review jury verdicts under the Re-examination Clause than courts of appeals," Resp. Br. at 18, respondent grossly misrepresents the holding in *Neely*. Again, respondent confuses the two clauses of the Seventh Amendment. The Reexamination Clause is never mentioned in *Neely*. *Neely* held that the entry of judgment as a matter of law by an appellate court without providing the option of new trial does not offend the *first* clause of the Seventh Amendment because, as a legal matter, plaintiff was not entitled to a jury. 386 U.S. at 321-22. Respondent's understanding of the holding in *Neely* is also directly contradicted by this Court's post-*Neely* statement in *Browning-Ferris* recognizing that the Seventh Amendment constrains appellate review of new trial motions.

[22] Unconvinced by precisely the same argument respondent makes here, this Court reversed the Second Circuit's new trial order premised on excessive damages and reinstated the judgment of the district court and jury in *Grunenthal v. Long Island R.R.*, 393 U.S. 331 (1968). *See* Brief for Respondent in *Grunenthal*, No. 68-35, at 5 (arguing that the Second Circuit "applied the legal standard. . . that permits an appellate court to enter judgment *n.o.v.*, and [*Neely*] held that appellate action under this standard is not forbidden by the Seventh Amendment"); *see also id.* at 10-11 (conflating appellate j.n.o.v. sufficiency review with appellate review of excessiveness motion because the Second Circuit gave "'petitioner the benefit of every doubt' and sought 'any rational manner consistent with the evidence' to justify the verdict" (citing Second Circuit).

[23] Respondent did not make a motion for judgment as a matter of law at the close of Mr. Gasperini's case or after trial. Accordingly, it is precluded from raising
(continued...)

whether the evidence was sufficient as a matter of law to allow it to be considered by the jury in the first instance. Instead, as amply demonstrated by even a cursory review of the record, the Second Circuit reexamined, re-weighed, and recharacterized the facts in this case and substituted its judgment for that of the jury by ordering a new trial. *See* Pet. Br. at 3-9, 44-46.

After acknowledging the difficulty it faced in making its own valuation "on a cold paper record" without "being able to see the lost transparencies themselves," Pet. App. 9a, the Second Circuit reexamined the conflicting *testimonial* evidence at trial: it found unpersuasive the testimony of plaintiff's expert and implicitly credited respondent's; it found that 250 of the lost transparencies had a specific value of $100, despite the absence of any evidence in the record to support that figure; it found that 50 of the slides were unique, despite never having seen the video reviewed by the jury which contained reproductions of 110 of the lost images; it found unpersuasive the evidence of Mr. Gasperini's efforts and plans to market the slides; and found "plausible evidence" to "conclude that . . . the jury could . . . award up to $1,500" for fifty of the images. *See id.* 5a-6a, 9a; Pet Br. at 3-9, 44-46. It cannot credibly be argued that the Second Circuit did not re-weigh the evidence in setting aside the jury's fact finding in this case.

Finally, respondent's attempt to impugn the reasonableness of the jury's verdict by citing to informal comments made by Judge Brieant is unavailing.[24] The legally significant opinion of Judge

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[23] (...continued)
the legal issue of the sufficiency of the evidence for the first time on appeal. *See* Fed R. Civ. P. 50; Wright, Miller & Kane § 2536 at 329 (it "is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court").

[24] Respondent cites, for example, Judge Brieant's remark that, "its incredible to me that *every single one* of the 310 photographs is worth $1500. . ." Resp. Br. at 2-3, 5; App. 243-44 (emphasis supplied). Respondent neglects, however, to provide the context of this and other quotes which demonstrate they were made as part of an effort to encourage the parties to settle. Just prior to making these remarks, Judge Brieant exhorted the parties to settle the case, stating "I really think maybe both of you [counsel for each side] should rethink your position on
(continued...)

Brieant is contained not in off-hand comments made while urging the parties to settle, but rather in the Judge's formal decision on respondent's Rule 59 Motion. The motion was fully briefed by both parties, considered by Judge Brieant and denied. App. 318-356; Pet. App. 11a-12a. As Judge Brieant must have recognized, the jury's valuation of each transparency at an average of $1500 was supported not only by Ms. Kinne's expert opinion, but also by a plethora of other evidence, *see* Pet. Br. at 3-6, 45-46, including the testimony of *respondent's* expert Gideon DiMargitay.[25]

CONCLUSION

The decision of the Court of Appeals for the Second Circuit should be reversed and the judgment of the District Court and the jury's verdict reinstated.

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[24] (...continued)
this case *and see if you can find a way to resolve it* before it goes to the jury." App. 244 (emphasis supplied). Moreover, the evidence at trial never suggested that each of the lost transparencies would earn precisely $1500. As Mr. Gasperini's expert, Jane Kinne, explained, the $1500 figure is an *average* based on the income each transparency could be expected to earn through *repeat* sales over the 94-years of Mr. Gasperini's copyright. App. 228. ("fees can range anywhere from [$]50 to $75 . . . to as [much] as $10,000. . . . You do that over and over for the life of the copyright, and the $1500 becomes a very fair and reasonable figure.") Thus, Judge Brieant's observation that every transparency would not earn exactly $1500, "[s]ome obviously get more [than $1500 and] some get less," *id.*; App. 22, is entirely consistent with the testimony offered at trial and with the jury's verdict.

[25] On direct examination, DiMargitay conceded that 47 of the 300 lost transparencies were unique and would be chosen by him if he were to publish a book on Central America. App. 273. He was then asked if he had an opinion concerning the value of the remaining 253 transparencies. In response, DiMargitay estimated that the remaining 253 slides would have earned between $150 to $200 over a ten year period. *Id.* Multiplying DiMargitay's own figures of $150 to $250 by 9.4 (the multiplier for the 94 year period of Mr. Gasperini's copyright) equals between $1410 and $1880 per transparency. Thus, respondent's own expert provided a basis for the jury to find that even the 253 transparencies that were described as of inferior value would have an earning potential of between $1410 and $1880 over the life of Mr. Gasperini's copyright. Accordingly, DiMargitay's testimony corroborated Kinne's that the $1500 figure was a "fair and reasonable" figure.

Respectfully submitted,

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